

BEFORE THE LOS ANGELES COUNTY
SUPERINTENDENT OF SCHOOLS

In the Matter of the Reduction in Force of:

CERTIFICATED STAFF OF THE LOS
ANGELES COUNTY OFFICE OF
EDUCATION (208 Full Time Equivalent
Positions),

Respondents.

OAH Case No. 2011030269

PROPOSED DECISION

Administrative Law Judge David B. Rosenman heard this matter on April 18 and 19, 2011, in Downey, California.

Aaron V. O'Donnell, Attorney at Law, represented the Los Angeles County Superintendent of Schools (referred to herein as the Los Angeles County Office of Education (LACOE)).

Richard J. Schwab, Attorney at Law, represented all Respondents identified on Attachment A, attached hereto and made a part hereof, except James Kern, who was present and represented himself.

Evidence was received and the matter was submitted. The record was closed on April 19, 2011.

The Administrative Law Judge makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Joseph Ybarra, Jr., Ph.D., LACOE's Assistant Superintendent of Human Resource Services, filed the Accusations in his official capacity. LACOE timely served the Accusations on all Respondents.

2. Respondents are employed as probationary or permanent certificated employees of LACOE.

3. On March 2, 2011, by Resolution 14, Jon R. Gundry, the Los Angeles County Interim Superintendent of Schools, determined to reduce and/or discontinue certain services within LACOE by a total of 208 full time equivalent (FTE) positions and directed Maria Hernandez, the Superintendent of Human Resources to give notice to certificated employees that their services would not be needed for the 2011-2012 school year. The FTEs are identified in the resolution (Exhibit 1).

4. The Interim Superintendent further determined that it was necessary by reason of said reductions or discontinuance of services to decrease the number of certificated employees at the close of the present school year, by a corresponding number of FTE positions and directed Ms. Hernandez or her designees to proceed accordingly by notifying the appropriate employees to implement the Resolution. Mr. Ybarra acted in accordance with this directive and prepared a recommendation that Respondents be given notice that their services would not be required for the ensuing school year (layoff notice). In a Supplemental notice dated March 15, 2011, Mr. Ybarra recommended to LACOE that one additional employee, Margaret Ferrell, also receive a layoff notice.

5. On or before March 15, 2011, pursuant to Education Code¹ sections 44949 and 44955, LACOE served each Respondent with the Accusation and notice that a hearing must be requested, in writing, by March 31, 2011, and that failure to request a hearing would constitute a waiver of the right to a hearing. LACOE used a one-step process whereby it served all Respondents except Ms. Ferrell with the layoff notice and the Accusation at the same time and included a single document designated a request for hearing/notice of defense for each Respondent to return if he or she contested the layoff.² Ms. Ferrell was served separately with first the layoff notice and later with the Accusation.

6. Respondents requested administrative hearings to determine if there was cause for not reemploying them for the 2011-2012 school year.

7. All Respondents, as identified on Attachment A, requested a hearing and all jurisdictional requirements have been met. Although some Respondents' requests for hearing were submitted after the deadline, LACOE did not object to those Respondents participating in this proceeding.

¹ Unless otherwise specified, all further statutory references are to the Education Code.

² Under section 44949, affected employees are to receive the layoff notice and, if they request a hearing, an accusation. The statute does not specifically direct these to be separate (two steps) or combined (one step). Subdivision (c)(3) allows school districts to adopt procedures "not inconsistent with provisions of this section as may be necessary to effectuate this section." Respondents did not claim any prejudice and raised no objection at the hearing to the use of this one-step process.

8. During the hearing LACOE requested that, due to attrition, vacancies, and for other reasons, the Accusations be dismissed against Respondents Jackie Brendlinger, Jewel Akins, Tuyan Tran, Margaret Ferrell, Delora Medina, William Brown, Blanca Perez and Shani Sambrano.

9. The recommendation that Respondents be terminated from employment was not related to their dedication and commitment as teachers.

10. The services at issue are “particular kinds of services” that could be reduced or discontinued within the meaning of section 44955. LACOE’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

11. The reduction or discontinuation of those particular kinds of services related to the welfare of LACOE and its pupils. The reduction or discontinuation of those particular kinds of services was necessary to decrease the number of certificated employees of LACOE. Ms. Hernandez testified credibly that LACOE determined to reduce the number of certificated employees in part due to the likelihood that it will receive less funding from the state, and because some school districts were not expected to continue to contract with LACOE to receive speech and language services because those districts planned to provide those services directly to their students.

12. LACOE maintains a seniority list that contains employees’ seniority dates (first date of paid service), current assignments and locations, credentials, and authorizations. LACOE used the seniority list to determine who would be laid off for each kind of service reduced or eliminated. LACOE then checked all Respondents’ credentials to determine whether they could “bump” other employees. LACOE also passed a resolution (Resolution No. 16, dated March 2, 2011) determining the order of seniority for employees who shared the same date of first paid service to LACOE (tie-breaking criteria). (Exhibit 2.) The tie-breaking criteria were properly applied.

13. The parties set forth their evidence and arguments as to why certain specified employees should or should not have been retained or challenging other aspects of the procedure, some of which are discussed below.

A. Respondents’ motion to dismiss

LACOE sent notices of nonreelection to several employees who serve LACOE under provisional credentials but also served them layoff notices “as a precaution, in order that they be permitted to participate in and exercise any claimed rights” to a layoff hearing. (Accusation, paragraph IV, Exhibit 13.) In Exhibit A to the Accusation, 21 employees received these precautionary notices. Of those, four employees (designated with a “*” in Attachment A to this Proposed Decision) submitted a request for hearing/notice of defense and are Respondents herein.

Respondents made a motion to dismiss the Accusations against all Respondents based on the contention that, as the Education Code does not specifically provide for such precautionary notices, the entire layoff proceeding is not authorized by law. Respondents' contention is not supported by the law or the facts and the motion is denied.

As set forth in more detail in Conclusion 8, school districts are permitted some flexibility and discretion in pursuing the layoff process. The final decision by the governing board, or in this case the Superintendent, follows the giving of layoff notices, the administrative hearing and the rendering of a proposed decision. There is sufficient authority to "over-notice" by sending some so-called precautionary notices. It is noted that none of the four Respondents who received precautionary notices raised a challenge to being laid off. Nevertheless, it is appropriate to allow the Superintendent the flexibility to address the situation should it arise. Further, as recognized in *CTA v. Mendocino Unified School Dist.* (2001) 92 Cal.App.4th 522, a school district that has laid off a probationary teacher under section 44955 may thereafter validly determine not to reelect that teacher under section 44929.21. There is no reason to believe that a school district could not undertake both actions at the same time, as done here by LACOE.

B. James Kern

Mr. Kern was originally hired by LACOE on August 27, 1999. He resigned and later returned and was reemployed by LACOE on July 1, 2008. His seniority was based on the date of reemployment and he has a seniority number of 760. He is a permanent employee teaching in a camp for incarcerated juveniles. He holds a clear multiple subject teaching credential. According to LACOE records and the seniority chart, Mr. Kern received a layoff notice because another teacher, Patricia Levin, whose position is being eliminated, has greater seniority (#14), has a multiple subject teaching credential, and can bump Mr. Kern. Mr. Kern contends that his seniority should be based on his original hire date of August 27, 1999.

Section 44931 requires that if a permanent employee resigns and is reemployed within 39 months of the date of his resignation, the employee must be restored to all of the "rights, benefits, and burdens of a permanent employee, except as otherwise provided in this code." Section 44848 requires that the date of employment of a certificated employee who resigns and returns to employment be deemed to be the date on which the employee first rendered paid service after reemployment. In accordance with the requirements of sections 44848 and 44931, Mr. Kern was restored to permanent status, but with a new seniority date upon his return to employment with LACOE following his resignation. LACOE assigned the correct seniority date to Mr. Kern.

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C. Loretta Harris

LACOE assigned to Ms. Harris a seniority date of September 12, 2008, and a seniority number of 795. Ms. Harris contends that she is entitled to an earlier date for two reasons: she attended at a two-day teachers' orientation in August 2008, and she began teaching that year on September 2, 2008. Her contention is not supported by the facts or the law.

Deborah Magnuson, the Operations Manager in LACOE's Human Resource Services, testified credibly that there was no record of Ms. Harris having been paid for the August orientation. The Personnel Requisition, a LACOE document indicating when an open position has been filled and employment has started, indicates Ms. Harris started her position on September 12, 2008. Further, records that Ms. Magnuson commonly consults (Exhibit 23) indicate that Ms. Harris served LACOE as a day-to-day substitute from January 10, 2007, until September 11, 2008, and that her regular teaching position began on September 12, 2008. Ms. Harris was paid a prorated portion of the salary for her teaching position for the month of September 2008 based on beginning in that position on September 12, 2008. LACOE assigned the correct seniority date to Ms. Harris.

D. Peter Labarba

LACOE assigned to Mr. Labarba a seniority date of November 29, 2010, and a seniority number of 887. Mr. Labarba contends that he is entitled to an earlier date.

When Mr. Labarba began employment with LACOE he signed a Personnel Requisition with the effective date of November 16, 2007. He held a multiple subject credential and an emergency permit as an intern at that time. (Exhibit B.) The permit was needed, as his multiple subject credential would not allow him to teach in his special education assignment. LACOE sent Mr. Labarba a letter, dated June 24, 2010, indicating that he would not be reelected for the 2010-2011 school year "because the certification document authorizing you to serve in your present assignment will expire during the 2010-2011 school year, and LACOE cannot be assured that you will obtain any other permit or credential authorizing service" for the duration of that school year. (Exhibit 20.) LACOE ended Mr. Labarba's assignment as of June 30, 2010. Although Mr. Labarba testified that he did not receive the letter, and was unaware of his nonreelection until receiving a different notice postmarked August 20, 2008 (Exhibit B, page 20), the evidence established that Mr. Labarba had sent an email on August 9, 2008, to Ms. Hernandez at LACOE that made specific reference to the June 24, 2010 letter.

Although Mr. Labarba notified LACOE that he was working on obtaining a credential in special education, had completed all coursework, and was eligible for the credential, he still had to complete and turn in a portfolio and was delaying applying for the Level I credential "because I know the Level II credential will follow shortly." (Exhibit 22, email dated August 9, 2010.) Ms. Hernandez replied by email that Mr. Labarba's District intern credential would expire December 1, 2010, and he needed another credential that would

extend at least for 90 days into the new school year, which was not true of the expiring District intern credential. (Exhibit 22.)

Eventually Mr. Labarba completed his requirements and he was issued a Level I Education Specialist Instruction Credential. When he notified LACOE, he was hired effective November 29, 2010, as a certificated probationary employee and was assigned a seniority date of November 29, 2010. Under section 44845, seniority is assigned from the first date on which the employee rendered paid service in a probationary status. (See, also, *Bakersfield Elementary Teachers Ass'n v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260.) Further, section 44911 provides that service under a provisional credential is not included in computing the time required for classification as a permanent employee. In *Fine v. Los Angeles Unified School Dist.* (2004) 116 Cal.App.4th 1070, a teacher serving under an emergency permit later received her preliminary multiple subject credential with a retroactive effective date, which she did not register with the district for more than a month, at which time the district offered her a contract to serve in a probationary position. Applying section 44911, the court held the district was not required to make her probationary status retroactive to the effective date of the credential but, rather, properly assigned her a seniority date based on her probationary contract. In the 2009-2010 school year Mr. Labarba was a temporary employee. He became a probationary employee as of November 29, 2010. LACOE assigned the correct seniority date to Mr. Labarba.

E. Literacy Specialist position

Respondents Luis Corrales and Ronald Cali testified to support their contention that they have the proper training, credential(s) and experience to serve LACOE in the position of Literacy Specialist, that LACOE is retaining employees as Literacy Specialists with less seniority and, therefore, they should be able to bump those less senior employees. Mr. Corrales submitted evidence of various qualifications, credentials, courses and credits he has obtained on the subject of reading and experience in assisting in diagnosing reading issues. Mr. Cali testified that he was qualified because of a component of obtaining his multiple subject teaching credential known as a Reading Instruction Competence Assessment (RICA). According to the Commission on Teacher Credentialing (CTC), the purpose of RICA is to ensure that credential holders “possess the knowledge and skills important for the provision of effective reading instruction to students.” (Exhibit F.) Twenty-four other Respondents present at the hearing at that time also indicated that they meet the RICA requirements. LACOE did not object to an offer of proof that several employees in the position of Literacy Specialist were less senior than some of the Respondents noted above. These Literacy Specialists are not noticed for layoff (except if bumped). These Respondents claim that they should bump the less senior Literary Specialists.

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LACOE submitted evidence of the creation of the position of Literacy Specialist, including communication with the CTC, the CTC Administrator's Assignment Manual and testimony of the requirements for the position. (Exhibits 24, 25, 27 and 28.)³ The evidence supports LACOE's contention that a CTC-issued Reading Certificate or Specialist Credential in Reading and Language Arts is a legitimate prerequisite to the position of Literacy Specialist. For example, the position requires more than reading instruction and diagnosis; it also includes training and supervision of other teachers, conducting demonstration lessons and coordination with site administrators. The Respondents who contend that they can fill a position of Literacy Specialist do not have either a Reading Certificate or Reading Specialist credential and are not properly certificated and competent to fill the position, as required under section 44955, subdivision (b). Therefore, those Respondents cannot bump the employees presently serving as Literacy Specialists.

14. Respondents raised other contentions in their brief evidence and argument. Except as specifically set forth herein, these contentions were not supported by sufficient evidence or the law and, therefore, are rejected.

LEGAL CONCLUSIONS

1. The Superintendent is the employer of Respondents under section 1293. By virtue of section 1294, the statutory procedures for school districts to layoff certificated employees under sections 44949 and 44955 are applicable to the Superintendent.

2. Section 44949, subdivision (a), states in pertinent part:

"No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee . . . that it has been recommended that the notice be given to the employee, and stating the reasons therefor."

Section 44949, subdivision (c)(3), states in pertinent part:

"The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. . . . Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors."

³ Although a portion of Exhibit 27 (the email from Roxann Purdue at CTC) is hearsay, the information in the email can be used to supplement and explain the other documents and testimony. (Gov. Code , §11513, subd. (d).)

3. Section 44955 provides, in pertinent part:

“(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

“(b) Whenever . . . a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, . . . and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

“As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. . . .

“(c) . . . [S]ervices of such employees shall be shall be terminated in the reverse order in which they were employed, as determined by the board in accordance with Sections 44844 and 44845. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he or she shall be deemed reemployed for the ensuing school year.

“The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. . . .

“(d) Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons:

“(1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.”

4. Sections 44949 and 44955 establish jurisdiction for this proceeding. The notice and jurisdictional requirements set forth in sections 44949 and 44945 were met. (Factual Findings 1 through 7.)

5. The services identified in LACOE's Resolution number 14 are particular kinds of services that it can reduce or discontinue under section 44955. LACOE's decision to reduce or discontinue the identified services was not arbitrary or capricious; it was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of LACOE's schools and pupils within the meaning of sections 44949 and 44955. LACOE correctly identified the certificated employees providing the particular kinds of services that it directed to be reduced or discontinued. (Factual Findings 3, 10, 11 and 12.)

6. A school district may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

7. LACOE must be solvent to provide educational services, and cost savings are necessary to resolve projected LACOE budget reductions, to insure that its schools provide, and students receive, required instruction in an effective and efficient manner. Such financial circumstances can dictate a reduction in certificated staff, and "section 44955 is the only statutory authority available to school districts to effectuate that reduction." (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 639.) The Superintendent's decision to reduce services in light of its budget addresses the welfare of students, and was a proper exercise of the Superintendent's discretion. Respondents did not establish that the proposed reductions in services would violate any statutory or regulatory requirement governing LACOE.

8. Boards of education hold significant discretion in determining the need to reduce or discontinue particular kinds of services, which is not open to second-guessing in this proceeding. (*Rutherford v. Board of Trustees, supra*, 64 Cal.App.3d 167.) Such policy-making decisions are not subject to arguments as to the wisdom of their enactment, their necessity, or the motivations for the decisions. (*California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1529.) Such decisions and action must be reasonable under the circumstances, with the understanding that "such a standard may permit a difference of opinion." (*Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.)

Numerous cases stand for the proposition that the process of implementing layoffs is a very flexible one and that school districts retain great flexibility in carrying out the process. (See, for example, *Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796.)

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9. No junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render.

ORDER

WHEREFORE, THE FOLLOWING ORDERS are hereby made:

1. The Accusations are dismissed as to Respondents Jackie Brendlinger, Jewel Akins, Tuyan Tran, Margaret Ferrell, Delora Medina, William Brown, Blanca Perez and Shani Sambrano.

2. LACOE may serve final notices to all Respondents identified on Attachment A, except as set forth in Order paragraph 1, that their services will not be required for the 2011-2012 school year.

Dated: April 22, 2011.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

ATTACHMENT A

“*” indicates that the employee received a Notice of Nonreelection as well as a precautionary layoff notice.

1. Akins, Jewel
2. Anyia, Fidelia
3. Arbuckle, Ruthann
4. Blair, Michael
5. Borrás, Valeria
6. Brendlinger, Jackie
7. Broomfield, Nicole *
8. Burrus, Stephanie
9. Cali, Ronald
10. Chime, Richard
11. Clarke, Newman *
12. Colet, Steven
13. Corrales, Luis

14. Croland, Carol
15. Cruces, Sylvia
16. Doyle, Troy
17. Eadens, Carol
18. Earl, Robert
19. Edpao, Allan
20. Estrada, Edward
21. Ferrell, Margaret
22. Fischer, Steven
23. Flores, Gerardo
24. Freedman, Gerald
25. Galvez, Adrienne
26. Garcia, Roger

27. George, Saji
28. Gipson, Dawn *
29. Harris, Loretta
30. Hastings, Gina
31. Hernandez, Claudia
32. Hernandez, Diana
33. Hernandez, Karl
34. Hong, Danny
35. Hossum, Chery
36. Jimenez, Hady
37. Kang, Eunsik
38. Kern, James
39. Labarba, Peter
40. Lahbil, Stefanie
41. Larsonsilva, Bon
42. Leveron, Thomas
43. Lizardo, DeAnn
44. Marin, Michelle
45. Mauk, Tae
46. Medina, Delora
47. Miyasato, Philip
48. Mizrahi, Lara
49. Murray, Irene
50. Navaroli, Martin
51. Norman, Vernon
52. Nwankwo, Ifeyinwa
53. Obakhume, Shaibu
54. Obiako, Harry
55. Okunna, Gloria

56. Okwuokei, Jude
57. Ozor, Ethelbert
58. Palomo, Ramiro
59. Pellegrini, Anna
60. Perez, Yula
61. Pinedo, Adrian
62. Purther, Carlo
63. Ransome, Astral
64. Reed, Jessica
65. Rusk, Timothy
66. Sandoval, Teresa
67. Scepan, Patricia
68. Shafer, James
69. Skelton, Lola
70. Soto, Claudia *
71. Spivery, Rudy
72. Strand, Shawn
73. Stump, Gail
74. Taylor, Cynthia
75. Tomlin, Patricia
76. Uti, Eno
77. Vinski, Sonia
78. Vlcek, Ann
79. Walker, Kenneth
80. Warner, Judy
81. Wecker, Paul
82. Winitsky, Marvin
83. Woods, Gayle